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Recognition of Arbitral Awards in Absentia: How to Assess the Validity of Service of Documents? Insights from the Paris Court of Appeal

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Service of documents against States raises the usual question of its validity or effectiveness with a particular acuity. Whilst the parties willing to communicate electronically may accommodate communication procedures accordingly, when it comes to service of documents against sovereigns, the electronic mode, due to its derogatory nature, must be duly agreed upon by States and effectively implemented by arbitral tribunals. Failing this, the award runs the risk of setting aside and of refusal of *exequatur* for breach of the adversarial principle.

The scenario arose before the Paris Court of Appeal ("Court") dealing with the appeal brought by the State of Libya against an ordinance recognizing an arbitral award *in absentia* in its favor. The Court thus addressed the admissibility of electronic service of both the request for arbitration and further documents related to arbitration proceedings against the State of Libya, and the scope of control by *exequatur* judge of the adversarial principle in arbitration proceedings.

Background

The origin of the case before the Court goes to an arbitral award rendered in 2014 in favor of a Tunisian-registered company, Siba Plast, against the State of Libya, in an *ad hoc* arbitration with a seat in Tunis. The award was further recognized in Paris in 2017, followed, three years later, by freezing of bank accounts, opened in France by the Libyan Investment Authority and the Libyan Foreign Bank, entities described as emanations of the State of Libya (*émanation de l'État*). It is then that the State of Libya appealed the *exequatur* ordinance alleging its unawareness, prior to the freezing of its assets, of both the existence of the arbitral award and of the French *exequatur* ordinance. In its turn, Siba Plast challenged the admissibility of the appeal against the *exequatur* ordinance due to its lateness.

Pursuant to Article 1525 of the French Code of Civil Procedure ("CCP"), in international arbitration proceedings, an *exequatur* decision may be appealed within one month starting from the date of a specific service of the decision on the debtor by a bailiff (French: *signification*). As an exception, the third paragraph of the said article provides that the parties may agree upon an

ordinary mode of service (French: *notification*) when the appeal is lodged against an award that has been granted *exequatur*.

It remained to be determined whether the electronic method to serve the *exequatur* ordinance to the State of Libya was an agreed mode between the parties, failing which the one-month time-limit provided for in the second paragraph of Article 1525 of the CCP had not started, and, consequently, the appeal lodged by the State of Libya against the *exequatur* ordinance was not, contrary to Siba Plast's arguments, untimely.

Having previously rejected Siba Plast's inadmissibility challenge due to the lateness of the appeal, the Court, in its ruling dated 1 October 2024, overturned the *exequatur* ordinance on the basis of a combined application of Articles 1520, 4° and 1525 of the CCP, and rejected Siba Plast's application for *exequatur* of the arbitral award.

Case Analysis

The significance of the Court's ruling lies in three different aspects of service of documents in arbitration, particularly relevant to service of documents against States.

First, the Court admits the very possibility of a contractual arrangement regarding service of request for arbitration and of any other document related to the arbitration proceedings against States. However, assuming that electronic method of communication is permissible, the Court of Appeal examined the way the communication has been made and noted errors in one of the electronic addresses used by Siba Plast. The Court reached the conclusion that given the "derogatory nature" of electronic mode of communication with a State (para. 36 of the ruling), dispatching electronic communication to both email addresses, explicitly agreed upon by the parties, was required, despite the fact that one of the two email addresses used by Siba Plast in their communication with the State was the one indicated in the contracts.

In the present case, the Court notes that the Tunisian Arbitration Code, applicable to the procedural aspects of the *ad hoc* arbitration seated in Tunisia, does not envisage the possibility of electronic communication in the proceedings. The validity of the agreement between the parties on electronic service of documents was therefore at the core of the Court's assessment. Defending its position on the validity of service in arbitration and thus the respect of adversarial principle under Article 1520, 4° of the French CCP, Siba Plast relied on a provision of the disputed contracts stating that "all correspondence relating to this contract must be sent by (…) e-mail (…)" to the *yahoo* and *gmail* addresses of the Libyan National Transitional Council Judicial Body Authority.

The Court however disagreed with the applicability of the said contractual provision to communications with respect to arbitration. In doing so, the Court relied on the procedural nature of the arbitration agreement and its autonomy from the substantive provisions of the main agreement. It follows from this autonomy that the method of communication agreed upon between the parties in relation to the contract cannot be extended to communications between parties pertaining to arbitration proceedings. Should however such mode of communication have been admissible, the Court notes the existence of material errors in the email addresses used by Siba Plast to send the request for arbitration to the State of Libya.

Furthermore, in addition to the very possibility of electronic service of documents and the

requirement of an explicit clause embedding such agreement between the parties, the Court adopts a nuanced approach to assess the respect of adversarial principle regardless of the absence of contractual agreement between parties upon electronic mode of service of documents.

Indeed, rather than concluding its reasoning on the inadmissibility of electronic service in the present case, the Court pursued its analysis of additional shortcomings by the arbitral tribunal regarding the adversarial principle. It noted, for instance, that there was no evidence that the summons to arbitration hearings or the corresponding transcripts had been properly served on the State of Libya (para. 37 of the ruling). The Court also emphasized that Siba Plast expressed new claim during the arbitration hearings which, in the absence of duly served transcript of the hearing, deprived the State of an opportunity to formulate its defense (para. 38 of the ruling).

Such meticulous analysis of the circumstances by the State judge suggests that, even if the parties do not agree upon the use of electronic communication in arbitral proceedings, the *exequatur* judge may still control the respondent's actual awareness of the arbitration proceedings brought against it. The Court's approach is both flexible, from the point of view of the defendant in the *exequatur* proceedings, and burdensome from the point of view of the *exequatur* judge and the arbitral tribunal.

Flexible considering that electronic mode has not been explicitly provided for in the applicable law or in the arbitration agreement does not suffice to conclude that there has been a breach of the adversarial principle and, as a consequence, to set aside the arbitral award or refuse its *exequatur*.

Burdensome as it constitutes an onus on the *exequatur* judge to verify that the arbitral tribunal has taken sufficient steps to ensure that the respondent was aware of the proceedings brought against it thus enabling it to exercise its defense rights. For analogy purposes, it is noteworthy that this approach is also consistent with Article 479 of the CCP applicable to default judgments rendered against a party residing abroad. The said provision states that the judgement must expressly lay out the diligences taken to inform the respondent of the commencement of proceedings. In that respect, the *exequatur* judge carries out a case-by-case control to determine if the diligences made by the arbitral tribunal suffice from the standpoint of the adversarial principle.

Tellingly, in the case at hand, in the absence of evidence establishing that the State of Libya has been duly informed of the arbitral proceedings against it, a mere indication in the hearing transcript of an email to the respondent may not be considered as satisfying the requirement of the adversarial principle.

Conclusion

The ruling strikes a balance between the formalistic approach required by the derogatory nature of electronic service against States and the rational implementation of such requirements, thus defining the scope of control of *exequatur* judge over the alleged breach of the adversarial principle invoked by the party resisting *exequatur* of arbitral awards *in absentia*.

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